IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-764

KENNETH LAFOUNTAIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

Page

INDEX i

TABLE OF CASES i

REFERENCE TO OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF WRIT 4

CONCLUSION 7

SIGNATURE OF COUNSEL 8

CERTIFICATE OF SERVICE 8

APPENDIX A — Opinion below 1a

APPENDIX B — Order on Petition for Rehearing . 4a

TABLE OF CASES

Page

Aguilar v. Texas, 378 U.S. 108 5

Aguilar v. Texas, 378 U.S. 108, 84 Sup. Ct. 1509, 12 L. Ed. 2073 (1964) 4

Aguilar v. Texas, 378 U.S. 108, 84 Sup. Ct. 1509, 79 Sup. Ct. 329, 3 L. Ed. 2d 327 6

Jones v. United States, 362 U.S. 257, 80 Sup. Ct. 725, 4 L. Ed. 2d 697 5

TABLE OF CASES (Continued)

Page

Spinelli v. United States, 1969, 393 U.S. 410, 416, 89 Sup. Ct. 584, 589, 21 L. Ed. 2d 637 7

Ventresca v. United States, 380 U.S. 102 5

Ventresca v. United States, 380 U.S. 102, 85 Sup. Ct. 741, 13 L. Ed. 2d 684 (1965) 4

United States v. Bursey, 491 F. 2d 531 (1974) 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

KENNETH LAFOUNTAIN,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH STANLEY LAFOUNTAIN, petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on the 23rd day of September, 1975, Petition for Rehearing denied on October 28, 1975.

REFERENCE TO OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit are not yet reported; a copy of each is appended hereto in Appendix, infra, pp. 1a and 4a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was delivered September 23, 1975; timely filed Motion for Rehearing was denied October 28, 1975.

Jurisdiction to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Trial Court erred in overruling Motion to Suppress evidence obtained as a result of an informant's tip that he "thought" the defendant was in the area for the purpose of making a marijuana deal.

2. Whether search of a motor vehicle and seizure of marijuana in the vehicle by officers of the Drug Enforcement Administration who did not have probable cause believe that the vehicle contained contraband may be constitutionally upheld on standards other than mandated by the Fourth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE

The evidence relied on by the Government to support the search in question reflects that an informant of known reliability told one of the investigating officers (Kiefer) that "two people were at Palm View Gulf Motel, that he had seen these two people before, that they had been in the Valley approximately one month or so previous to the occasion on the 27th, (the date the information was first received) and he (the informant) knew that when they had left the Valley on that occasion they had taken a load of marijuana with them."

It was further established by cross-examination that the informant had only said he *thought* the people were down to score another load of marijuana.

> Question: "But he wasn't sure is that right?"
> Answer: "Of course not."

Officer Keifer received the information on September 27, 1974 and the arrest was not made until the 29th. On the 29th the officers were told by the informant "it looks like they are going to make their buy or transaction this morning." Or he thought they were going to do it this morning. It should be noted that the officers

were not informed where, how, or when the transaction would take place.

On the 29th of September officer Resse was told by the informant that the 1974 light green two-door Chevrolet with a specific license plate would be picked up and loaded with narcotics. The Appellant was seen getting into the automobile in question and drove off. The officer followed the automobile and saw it make three U-turns and then drive to a residence on Ware Road. At the residence the automobile was backed up and the trunk lid open.

Later the same day the Appellant drove to the house in the Oldsmobile he was arrested in and let out Ellen Clark who got into the 1974 Chevrolet and both vehicles drove off. A short time later both vehicles were stopped and both Ellen Clark and Appellant were arrested.

REASONS FOR ALLOWANCE OF WRIT

1.

The constitutional questions presented in this cause arise under the Fourth Amendment. Appellant contends for and the opinion of the Circuit Court rejects the proposition that there was no probable cause for the search and seizure in question and that the circumstances of this case, are at war with the rule laid down in *Aguilar v. Texas*, 378 U.S. 108, 84 Sup. Ct. 1509, 12 L. Ed. 2073 (1964); and *Ventresca v. United States*, 380 U.S. 102, 85 Sup. Ct. 741, 13 L. Ed. 2d 684 (1965). The precise issue is yet to be decided by the Supreme Court.

2.

There is absolutely no doubt, if one is to follow the dictates of the Supreme Court in the case of *Ventresca v. United States*, 380 U.S. 102, that a search without a warrant must follow "the two prong test" set out in *Aguilar v. Texas*, 378 U.S. 108. *Aguilar* states in part that:

> "Although an affidavit may be based on hearsay information and need reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, 80 Sup. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information was 'reliable'."

To review the defects and the evidence supporting the search and seizure we find the following:

1. The informant at no time told any of the officers how he had received the information concerning Appellant.

2. The officers did not and could not confirm the information that the Appellant had been in the area sometime prior to the arrest date for the purpose of marijuana transaction.

3. The informant did not know the names of the Appellant or his companion and only described them as a middle-aged couple.

4. The information concerning the color of the Chevrolet given to the officers by the informant was incorrect.

5. The informant did not tell the officers where the residence on Ware Road was or that that was the location where the transaction would take place, or where the marijuana was to be picked up.

6. The informant had told the officers that the Chevrolet was going to be loaded and although the vehicle was under surveillance, at no time did the officers see narcotics placed in the vehicle. The officers had information from the informant for approximately two days prior to the arrest, but made no effort at all to obtain a search warrant.

In the instant case what is lacking is of course the second prong of *Aguilar v. Texas*, 378 U.S. 108, 84 Sup. Ct. 1509, 79 Sup. Ct. 329, 3 L. Ed. 2d 327, that is, there was no factual information given by the informant which would support the tip he gave to the officers.

This Court in the recent case of *United States v. Bursey*, 491 F. 2d 531 (1974) reaffirmed the above by stating that "Judicial Scrutiny is even more exacting in instances of warrantless searches, . . ."

It is submitted that the facts in *Bursey* are on all fours with the facts in the instant case i.e.: In each the

officers relied on an informant who neither related details of an anticipated transaction nor indicated the source of his information; there was no showing in either case that the parties had recently been across the Mexican border* and in each case the surveillance unveiled no reasonable suggestion of criminal conduct when the actions are viewed by themselves. What we have here is what Justice Harlan and this Court has characterized as "casual rumor(s) circulating in the underworld." *Spinelli v. United States*, 1969, 393 U.S. 410, 416, 89 Sup. Ct. 584, 589, 21 L. Ed. 2d 637.

It is respectfully submitted that not only are substantial questions presented by this Petition for Writ of Certiorari but also, being so closely akin to those raised in *Ventresca*, the precise issue should be answered without undue delay.

The instant case is an appropriate vehicle for settling important questions of Federal Law implicating the Fourth Amendment and past cases of the Supreme Court. It directly presents for determination the meaning and extent of the *Aguilar* case as seen and compared with the facts in *Ventresca*.

CONCLUSION

For the reasons set forth above, petition for a Writ of Certiorari should be granted. On further hearing on the merits the opinion and judgment of the United

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* No effort is made in the instant case to support this search as a border search.

States Court of Appeals for the Fifth Circuit should be reversed and remanded for further proceedings.

Respectfully submitted,

Daniel V. Alfaro

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Daniel V. Alfaro, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to the Honorable Edward McDonough, United States Attorney, P.O. Box 61129, Houston, TX 77208, and upon Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, this ____ day of November, 1975.

Daniel V. Alfaro

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2205
SUMMARY CALENDAR*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH LaFOUNTAIN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

[September 23, 1975]

Before COLEMAN, AINSWORTH, and SIMPSON, Circuit Judges.

PER CURIAM:

On September 27, 1974, DEA Agent Kiefer was contacted by a previously reliable informant who told him

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

that two persons were registered in the Palmview Gulf Motel in McAllen, Texas. He stated this couple had been in the area one month before and were again in the area to complete another drug transaction. He gave a detailed description of their vehicles, a green Chevrolet and an Oldsmobile including license numbers. On September 29, the informant again attempted to contact Kiefer, but instead got Detective Rosser and informed him that the transaction would take place that morning. Surveillance of the suspect vehicles was begun. They were taking evasive driving actions. Later the informer reached Kiefer and stated the transaction was in progress and under surveillance at a residence on Ware Road.

The Oldsmobile left the residence at 9:45 A.M., but returned an hour later. Appellant was accompanied by co-defendant Clark. She got into the Chevrolet and they both drove off. When their surveillance was detected, the officers stopped the cars. The Chevrolet was searched on the spot and found to contain 253 pounds of marijuana. The Oldsmobile was taken into custody and searched at DEA headquarters, where it was found to contain 202 pounds of marijuana. Appellant argues the search was illegal and the marijuana should have been suppressed.

The Court sustained the validity of the search for sufficiently exigent circumstances, coupled with probable cause, Carroll v. United States, 267 U.S. 132 (1925).

The Court found probable cause because of the informer's information. It was established that the in-

former was a reliable one, Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The Court further found that although the informant did not disclose his source of information, it was sufficient to establish probable cause because of the wealth of detail that he supplied. He described the couple, gave the address where they were staying, and the cars they were driving, with license numbers. He also related past dope dealing, and informed the officers when the deal was taking place. Under the circumstances, probable cause was established, United States v. Sellers, 5 Cir., 1973, 483 F.2d 37; United States v. Olivares, 5 Cir., 1974, 496 F.2d 657, 660.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2205

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH LaFOUNTAIN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(OCTOBER 28, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

No. 75-764

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNETH LAFOUNTAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-764

KENNETH LaFOUNTAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's sole contention is that the warrantless search of his automobile was conducted without probable cause.

Following a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of a controlled substance (marihuana) with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment, be be followed by two years' special parole. The court of appeals affirmed (Pet. App. 1a-3a).

The evidence showed that on September 27, 1974, Drug Enforcement Administration agent Charles Kiefer was contacted by an informant who had provided reliable information some twenty times in the past (Tr. 8). The informant stated that a middle-aged couple had registered at the Palm View Golf Motel in McAllen, Texas, and were

about to secure a purchase of drugs. He told Kiefer that the couple had also been in the area one month earlier, when they had obtained a quantity of marihuana (Tr. 7-8, 14). The informant also gave the agent a detailed description of the couple's automobiles, an Oldsmobile and a rented Chevrolet, including their license numbers (Tr. 9, 12-14, 39).

On September 29, 1974, at 7:30 a.m., the informant, having failed to contact Kiefer, called Vernon Rosser, a local detective, to alert him that the Chevrolet would be picked up that morning at the motel and loaded with drugs (Tr. 48, 55-56). Rosser immediately established surveillance outside the motel and observed the arrival of a black Riviera. Petitioner alighted from this car and departed in the Chevrolet, followed closely by the detective. As petitioner drove away, he made several U-turns, apparently in order to detect any possible surveillance (Tr. 57). Rosser's presence was evidently not detected, and petitioner drove to a residence approximately five miles from McAllen. There, Rosser observed the Chevrolet backed up between two buildings, with its trunk lid open (Tr. 51-52).

Meanwhile, the informant had contacted agent Kiefer and warned him of the upcoming drug transaction. Kiefer and D.E.A. agent Kenneth Moore then joined Rosser (Tr. 8-9, 17-19).[1] At approximately 9:45 a.m., petitioner was seen leaving the residence in an Oldsmobile station wagon. The officers attempted to follow him but lost contact and returned to surveillance of the residence (Tr. 9, 53). Petitioner returned with a female passenger at approximately 10:45 a.m. His companion started the Chevrolet, and both cars drove away. Petitioner soon realized that he was being followed and made a U-turn, after

[1]The informant by then was also in the area, and agent Moore spoke to him shortly before joining Rosser (Tr. 62-63, 75).

which the police stopped both cars. The Chevrolet was searched immediately and yielded some 253 pounds of marihuana; the Oldsmobile was taken into custody and later searched at the D.E.A. office, where it was found to contain some 202 pounds of marihuana (Tr. 10-11, 53-54).

Petitioner's only argument is that the agents lacked probable cause for the warrantless search of the vehicles because there was an insufficient showing of the underlying circumstances from which the informant determined that an offense was to be committed.

While we believe that the specificity of the informant's report may well have been sufficient to establish probable cause, the stop of petitioner's vehicle was in fact not based on the tip alone, but also on the results of the ensuing surveillance of petitioner's highly suspicious activities, which amply corroborated the reliability of the tip and provided probable cause for the stop and search.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully,

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

DOJ-1976-02